IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 353.

HENRY S. HASKINS, as Receiver for the TUSCARORA-NEVADA MINES COMPANY, a corporation,

Petitioner,

v.

ROY F. ROSEBERRY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

THOMAS F. RYAN,
JOSEPH M. HARTFIELD,
EUGENE FREDERICK ROTH,
Counsel for Petitioner.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Henry S. Haskins, as receiver for the Tuscarora-Nevada Mines Company, a corporation, prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Ninth Circuit entered in the above case on May 7, 1941, affirming a decree of the United States District Court for the District of Nevada.

Opinions Below

The opinion of the District Court (R. 151-155) is reported at 29 F. Supp. 724. The opinions of the Circuit Court of Appeals (R. 206-224) are reported at 119 F. (2d) 803.

Jurisdiction

The decree of the Circuit Court of Appeals was entered on May 7, 1941 (R. 224-225). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (U. S. C., Title 28, Section 347).

Questions Presented

1. May requirements imposed by decisions of this Court, in connection with the sale of property for state taxes while it is in the custody of a court of the United States, be dispensed with by the legislature of the State of Nevada?

2. Shall the principle, announced by this Court in several decisions, that property in the custody of a federal court may not be sold for delinquent state taxes without the prior permission of such court, or its subsequent consent or approval, now be abandoned?

3. May title to property be gained by adverse possession while that property is in the custody of a court of the United States? (This is an important question of federal law which has not been, but should be, settled by this Court.)

4. Can a tax deed, admittedly void when executed and delivered, because the property described therein was then and at the time of the tax sale under active administration in a federal court receivership, be regarded as sufficient to set in motion a special statute of limitations, or to furnish a basis for a claim of title founded on adverse possession under color of title?

5. May the courts of the United States ignore Section 8512 of the Nevada Compiled Laws, 1929, and the construction which the Supreme Court of Nevada has placed on Section 8508 of the said Nevada Compiled Laws?

6. Will mere lapse of time, coupled with nothing more than fruitless expenditure of money by an adverse claimant, constitute laches barring recovery of property by the owner thereof, where the owner has no notice of the adverse claim, and there is no prejudice to the adverse claimant through loss of evidence, change of title, intervention of innocent equities, increase in the value of the property, or other equitable factor, and the expenditures of money by the adverse claimant result in no enhancement of the value of the property, and hence in no unjust enrichment of the owner if he is allowed to recover?

7. May judgment be entered in favor of the defendant, on the ground that the plaintiff's cause of action is barred by the statute of limitations, in a case in which the defendant has not affirmatively pleaded such defense, although required to do so by Rule 8(c) of the Federal Rules of Civil Procedure, and the plaintiff has neither expressly nor impliedly consented to the trial of the action as if such defense had been pleaded?

Statutes Involved

The portions of the section of the revenue laws of the State of Nevada (Section 6449, Nevada Compiled Laws, 1929) on which the decision and majority opinion in the Circuit Court of Appeals are based read as follows:

> "No tax heretofore or hereafter assessed upon any property, or sale therefor, shall be held invalid by any court of this state on account of any irregularity in any assessment, or on account of any assessment or tax roll not having been made or proceeding had within the time required by law, or on account of any other irregularity, informality, omission, mistake or want of any matter of form or substance in any proceedings which the legislature might have dispensed with in the first place if it had seen fit so to do, and that does not affect the substantial property rights of

persons whose property is taxed; and all such proceedings in assessing and levying taxes, and in the sale and conveyance therefor, shall be presumed by all the courts of this state to be legal until the contrary is affirmatively shown. No action or counterclaim for the recovery of lands sold for taxes shall lie unless the same be brought or interposed within three years after the execution and delivery of the deed therefor by the treasurer, any law to the contrary notwithstanding" (R. 172-173).

The pertinent portions of Section 8508 of the Nevada Compiled Laws, 1929, read as follows:

"No action for the recovery of mining claims, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, or those through or from whom he claims, were seized or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before the commencement of such action. Occupation and adverse possession of a mining claim shall consist in holding and working the same, in the usual and customary mode of holding and working similar claims in the vicinity thereof" (R. 174, in part).

Section 8512 of the Nevada Compiled Laws, 1929, which is applicable in the instant case, reads as follows:

"In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it shall appear:

1. That it has been protected by a substantial inclosure; or

2. That it has been cultivated or improved in accordance with the usual and ordinary methods of husbandry."

Other statutory provisions having a possible bearing on the instant case, and mentioned in the concurring opinion in the Circuit Court of Appeals, will be found in the Appendix, infra, pp. 20-21.

Statement

From the findings of fact of the District Court, the stipulations and admissions of the parties, and the undisputed evidence, the following material facts appear:

In April, 1913, the United States District Court for the Southern District of New York appointed Henry S. Haskins, a citizen of the State of New York, and the petitioner herein, as receiver for the Tuscarora-Nevada Mines Company, a Maine corporation (R. 156). The order directed "that the business of the said defendant be wound up and its property and franchises be converted into money" (R. 144, Paragraph "Seventh").

In August, 1913, the United States District Court for the District of Nevada appointed petitioner as ancillary receiver of said company, the assets and property of which were principally in Nevada (R. 157).

At the trial of the instant action, when the defendant Roseberry was asked whether he had heard anything about the financial difficulties of the Tuscarora-Nevada Mines Company which led to the appointment of a receiver for it in 1913, he replied: "Yes, I believe I did" (R. 86).

Receiver's certificates, approximately $75,000.00 in amount, issued by petitioner pursuant to authority duly given, are still outstanding and unpaid (R. 160).

(For brevity's sake, we omit the details as to a purported dismissal of the Nevada receivership action in 1914 (R. 158), its subsequent reinstatement in 1917 (R. 158-160), the filing of reports by the receiver in both the Nevada and New York receivership proceedings in 1917 (R. 160), the marking of the New York proceedings off the trial calendar, under Equity Rule 57, in 1918, and the

subsequent dismissal of those proceedings in 1927 because no application for reinstatement to the trial calendar was made within the time allowed therefor (R. 160-161). Those things have become immaterial in view of the admission by defendants' counsel, at the oral argument in the Circuit Court of Appeals, "that the tax deed here involved was invalid because the sale was made during the active administration of the property by the federal court" (R. 217-218).)

On March 6, 1928, petitioner filed an affidavit, in lieu of an account, in the New York proceedings praying to be "relieved from any further duties as receiver," and asking to be relieved from further liability on the bond he had given therein (R. 147-149); but the order entered thereon merely released the sureties on the bond from "any and all liability" under it (R. 145, 161).

Petitioner admittedly continued to perform his duties as receiver until 1929, but because of the deteriorated condition of the property was unable to obtain the financial assistance required to rehabilitate or operate it, or any offers for it "which were commensurate with the actual value of the same" (R. 42-43, 162); and therefore, on February 16, 1929, he tendered his resignation as ancillary receiver in a report filed that day in the Nevada proceedings (R. 58-60). That report advised the Court that "said Ancillary Receiver has not sold said mining claims, or any part thereof" (R. 59).

On February 18, 1929, the Nevada court accepted the resignation of petitioner, and released both him and the surety on his Nevada bond from "further liability" (R. 162-163); and on April 3, 1929, the Nevada court entered another order releasing petitioner and the surety on his bond from "liability" (R. 129-130).

In the meantime, the properties involved in this action were sold, on July 17, 1922, for delinquent 1921 state and county taxes, in full accordance with the revenue statutes of the State of Nevada, to the defendant Roseberry and his

then partners (R. 166); and on July 19, 1923, a tax deed "regular in form and in accordance with the statutes of the State of Nevada" was executed and delivered to the purchasers at the tax sale (R. 166).

The properties so sold include a town lot, buildings, a water works and pipe line, water rights, and mining claims (R. 165-166). The mining claims had been patented (R. 37).

Said tax sale was held, and said tax deed executed and delivered, without notice to the receiver or to the court in either of the receivership proceedings, and without authorization from, or the consent or approval of, either of the receivership courts (R. 6, 17, 41, 169-170).

Petitioner had no notice of the tax sale, or of the execution and delivery of the tax deed, until shortly before the commencement of this action (R. 170).

Neither the proofs offered at the trial of this action, nor the stipulations or admissions of the parties, show that any order was made or entered at any time in either of the receivership proceedings disposing of the receivership assets, or directing that they be returned to the Tuscarora-Nevada Mines Company (R. 170-171).

The defendants have admitted that the properties so sold for taxes were in custodia legis at the time of the tax sale (R. 5, 17, 171); and that the tax deed issued pursuant to such sale was therefore invalid (R. 217-218).

The defendant Roseberry admitted, at the trial of this action, that "mining had been quiet for a good many years" at the time of the tax sale (R. 88).

Until an undivided one-half interest in the tax title was conveyed to the defendant Thatcher, any rights that may have been created by said tax sale and deed remained at all times in the defendant Roseberry, or one or more of his partners in the tax purchase (R. 171-172); and the defendant Thatcher does not claim to be an innocent purchaser of the interest conveyed to him (R. 80-81, 172).

Since July 19, 1923, the defendant Roseberry, first with and then without his partners, and more lately with the

defendant Thatcher, has been in actual occupancy of all of the property so sold for taxes, has paid all taxes subsequently levied and assessed thereon, has been working the mining claims in the usual and customary mode of holding and working similar claims in the vicinity thereof, and has operated and maintained the water works and pipe line (R. 167-169); and has held and occupied all of said property openly, notoriously and adversely at all times since said July 19, 1923 (R. 168-169).

The taxes so paid by the defendants up to the time of the trial amounted to $852.09 (R. 49-50); but during the first four years after Roseberry took possession the assessed valuation of the property declined from $6,325.00 to $1,950.00, at which figure it has remained ever since (R. 49-50).

Since July 19, 1923, the defendants have expended in excess of $57,000.00 on the property involved (R. 169), all of which, except approximately $1,500.00, was for operating expenses of automobiles, feeding and care of horses, wages of certain employees, and the value which the defendant Roseberry placed on his own time (R. 95-100).

The only portion of defendants' expenditures which is reflected in any permanent and beneficial improvement to the property is the sum of $750.00 spent on purchasing, freighting in and installing some 300 feet of steel pipe at the head of the pipe line (R. 97-98). There is no testimony as to the amount, if any, by which this pipe has enhanced the value of the property.

Up to the time of the trial, the defendants have collected cash revenues from the property of $717.16 from their mining operations (R. 99, 109), and approximately $3,953.00 from the sale of water (R. 99). Roseberry has personally used water, up to the time of trial, the cost of which to any other user would have been $588.00 (R. 108).

Because of the recent increase in the price of silver and gold, which are found on the property here involved, certain

interests, including the Princess Mining Company, owner and holder of most of the receiver's certificates issued as aforesaid, became interested in those properties (R. 10-11, 20). This led to the discovery of the tax sale and deed. Petitioner's representative offered to pay the defendant Roseberry the sum of $1,000.00 in May, 1936 (R. 102), to get rid of any claim he might assert because of the tax deed. At that time, the total taxes paid by the defendants aggregated only $767.07 (R. 49-50). This offer was not accepted (R. 103).

Thereafter, on October 9, 1936, petitioner sought, and obtained, from the New York court permission to file a new bond in the New York receivership proceedings, so that he might take steps to recover the property so sold for taxes (R. 114-121, 163-164); and on December 21, 1936, he sought, and obtained, from the Nevada court reinstatement as ancillary receiver, and express permission to bring this action to remove the cloud on title created by said tax sale and tax deed (R. 61-69, 133-139, 163-164).

This action was commenced on May 17, 1937; and tried by the court, without a jury, on November 22 and 23, 1938. At the close of the trial, petitioner tendered to the defendants, in open court, the amount they had paid as taxes on the property, together with interest on each of the several tax installments from the dates on which they were respectively paid to the date of the said tender, at the Nevada statutory rate of seven per cent per annum (R. 150). The defendants made no reply to the tender (R. 150-151).

The District Court held (R. 173-175) that petitioner was barred from maintaining this action by laches and by the statutes of limitation contained in Sections 6449 and 8508 of the Nevada Compiled Laws, 1929 (ante, pp. 3-4); and decreed (R. 176-177) that petitioner's complaint be dismissed with prejudice, and that the title to the property involved be quieted in the defendants.

The Circuit Court of Appeals affirmed the decree of the District Court (R. 206-225), holding that the legislature of

Nevada has the power to dispense with the requirement that the consent or approval of the Federal Court must be obtained before property held in the custody of courts of the United States may be sold for state taxes, and therefore this action is barred by the limitation contained in said Section 6449 of the Nevada Compiled Laws, 1929.

The opinions filed in the Circuit Court of Appeals contain certain statements of fact which are either unsupported by the record herein or are contrary to facts established by uncontradicted testimony or by findings of the District Court. They are:

The majority opinion applies Rule 15(b) of the Federal Rules of Civil Procedure (R. 211-212) on the unsupported statement of counsel for the defendants, made at the oral argument in the Circuit Court of Appeals, that this case had been tried on the express or implied consent of the parties that the statute of limitations had been pleaded as a defense. This statement was untrue. None of the evidence offered by the defendants could have been objected to successfully, on the ground that this defense had not been pleaded, as all of that evidence was admissible either under the plea of laches or the defendants' denial that petitioner was the duly appointed, qualified and acting receiver for the Tuscarora-Nevada Mines Company.

The concurring opinion states (R. 218) that petitioner had knowledge of, and acquiesced in, the defendants' possession of the property here involved, and their activities thereon. The District Court found that petitioner had no notice of the tax sale, or tax deed, until shortly before the commencement of this action (R. 170).

The concurring opinion states (R. 220) that "without additional funds the property would be lost by the failure to do assessment work." The defendants expressly admitted that the mining claims here involved were patented (R. 37, Paragraph 8). Assessment work is not required on patented mining claims.

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In holding and deciding that the legislature of the State of Nevada could dispense with the requirement that consent or approval of the Federal Court must be obtained before property held in custody by a court of the United States may lawfully be sold for delinquent state taxes.

2. In holding and deciding, as a consequence of the foregoing, that the limitation contained in Section 6449 of the Nevada Compiled Laws, 1929, is a bar to this action.

3. In holding that Rule 15(b) of the Federal Rules of Civil Procedure is applicable in this action; and that therefore judgment and decree may be entered in favor of the defendants notwithstanding their failure to plead such defense.

4. In holding and deciding, in effect, that title to property may be gained by adverse possession while it is held in custody by a court of the United States.

5. In ignoring the provisions of Sections 8508 and 8512 of the Nevada Compiled Laws, 1929, and the construction which the Supreme Court of Nevada has placed on said Section 8508.

6. In holding and deciding, in effect, that a tax deed, which is admittedly void for jurisdictional reasons, can furnish a basis for a decree that title to property has been gained by adverse possession under color of title.

7. In affirming the decree of the District Court.

Reasons for Granting the Writ

1.

The decision below conflicts with decisions of this Court, and of the Supreme Court of Nevada. It has been firmly established that when a court has appointed a receiver, and through him has taken property into its custody and possession, that property may not be taken and sold, even for taxes, without the consent or approval of such court. *Ex Parte Tyler,* 149 U. S. 164, 37 L. Ed. 689, 13 S. Ct. 785; *Dayton* v. *Stanard,* 241 U. S. 588, 60 L. Ed. 1190, 36 S. Ct. 695.

The local law in Nevada is to the same effect. In *Irving National Bank* v. *District Court,* 47 Nev. 86, 217 Pac. 962, the Supreme Court of Nevada said:

> "Intervention in receivership proceedings is the proper remedy in the case of liens for taxes, which are held to be paramount to all other liens, except judicial costs. In Re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689." (47 Nev. 93.)

In a number of other cases this Court has held that when property is in the custody of a court, whether state or federal, it may not be taken from such custody, or interfered with, by any other agency, either state or federal, except upon the consent or approval of the court having such custody. For example, see: *Taylor* v. *Carryl,* 61 U. S. (20 How.) 583, 15 L. Ed. 1028; *Covell* v. *Heyman,* 111 U. S. 176, 28 L. Ed. 390, 4 S. Ct. 355; *Wiswall* v. *Sampson,* 55 U. S. (14 How.) 52, 14 L. Ed. 322.

The property here involved was in the custody of a court of the United States, and therefore the decision of the Circuit Court of Appeals that the legislature of the State of Nevada could dispense with the requirement that consent or approval of such court must be obtained before that property could lawfully be sold for taxes not only conflicts with the aforesaid decisions of this Court, but it amounts

to a holding that the powers and jurisdiction confered upon the courts of the United States by Article 3, Section 2, Clause 1, of the Constitution of the United States may be undermined and eroded, if not actually ousted in toto, by the action of state legislatures.

In *Board of Commissioners of Jackson County, Kansas* v. *United States,* 308 U. S. 343, 350, 60 S. Ct. 285, 288, 84 L. Ed. 313, this Court said:

> "Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated."

A further reason for granting the writ of certiorari in this case is the strong criticism of the majority's decision on this point found in the concurring opinion in the Circuit Court of Appeals (R. 217).

This case does not fall within the embrace of the Act of June 18, 1934, c. 585, 48 Stat. 993, 28 U. S. C. No. 124(a), because the taxes for which the property was sold accrued prior to June 18, 1934, and the "United States court having final jurisdiction of the subject matter under existing law" did not "adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same".

2.

The decision below, that this action is barred by the statute of limitations contained in Section 6449 of the Nevada Compiled Laws, 1929, conflicts in principle with decisions of this Court. Counsel for the defendants admitted, at the oral argument in the Circuit Court of Appeals, that the tax deed upon which they base their claim of title was "invalid because the sale was made during the active administration of the property by the federal court" (R. 217-218). In *Moore* v. *Brown,* 11 How. 414, 13 L. Ed. 751, and later in *Redfield* v. *Parks,* 132 U. S. 239, 33 L. Ed. 327, 10 S. Ct. 83,

this Court held that tax deeds which were void because the tax sale was held on a day not authorized by law would not support the tax deed holder's claim of title by adverse possession for the period specified in the statute of limitations, even though the power of the state to sell for taxes was unquestionable in both of those cases. The instant case is a stronger one than either of those cited, because here the power to sell was completely lacking in the absence of consent to or approval of the tax sale by the court holding the property in custody. See also: *Black on Tax Titles,* Section 283.

3a

In holding and deciding that it was unnecessary for the defendants to plead affirmatively the defense of the statute of limitations, despite the requirements of Rule 8(c) of the Federal Rules of Civil Procedure, the court below accepted the unsupported statement of counsel for the defendants that this case had been tried on the express or implied consent of the parties that such defense should be treated as if it had been pleaded. The record shows that this statement is untrue.

This Court has not announced the extent to which Rule 8(c) is obligatory, but the decisions of the lower federal courts indicate that it means what it says—that the defenses therein mentioned must be pleaded affirmatively by a defendant who wishes to obtain the benefit of them. See: *Bridges* v. *Dahl* (C. C. A., 6th), 108 F. 2d 288; *Dinan* v. *First National Bank of Detroit* (C. C. A., 6th), 117 F. 2d 459; *Frederick W. Huber, Inc.* v. *Pillsbury Flour Mills Co.,* 30 F. Supp. 108; *Munzer* v. *Swedish American Line,* 30 F. Supp. 789; *Thierfeld* v. *Postman's Fifth Avenue Corporation,* 37 F. Supp. 958; *Continental Illinois National Bank & Trust Co.* v. *Ehrhart,* 1 F. R. D. 199; *Dirk Ter Haar* v. *Seaboard Oil Co. of Delaware,* 1 F. R. D. 598.

4.

The decree of the court below in effect decides that one may gain title to property, by adverse possession, while a court of the United States is holding that property in custody. This is an important question of federal law which has not been, but should be, settled by this Court.

There are only a few decided cases dealing with the point, but they are in agreement that property in custodia legis cannot be acquired by adverse possession. *Ewin* v. *Lindsay* (Tenn. Chan. App.) 58 S. W. 388; *McAllen* v. *Crafts* (Tex. Civ. App.), 139 S. W. 41. The property here involved was admittedly in the custody of a court of the United States at the time of the tax sale on which the defendants base their claim of title (R. 171).

5.

The decision of the Circuit Court of Appeals fails to comply with the requirements of Section 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 1 Stat. 92, 28 U. S. C. No. 725, 28 U. S. C. A. No. 725, in that it fails to give effect to statutes of the State of Nevada, and particularly to Sections 8508 and 8512 of the Nevada Compiled Laws, 1929, ante, p. 4, as well as to the construction placed on said Section 8508 by the Supreme Court of Nevada.

Section 8508 provides that no action for the recovery of mining claims shall be maintained, "unless it appear that the plaintiff, or those through or from whom he claims, were seized * * * of such mining claim, * * * within two years before the commencement of such action." In *South End Mining Co.* v. *Tinney,* 22 Nev. 19, 35 Pac. 89, the Supreme Court of Nevada construed this statute, and said: "the word 'seized' means something different from simple possession of a claim, or of a holding of it in accordance with the laws and customs of miners. If so, it must

mean, as it would naturally import, an ownership in fee, for this is the only other kind of ownership known to the law" (22 Nev. 35-36). This is no mere dictum. *Six Companies of California* v. *Joint Highway Dist. No. 13,* 311 U. S. 180, 85 L. Ed. Adv. Ops. 159, 61 S. Ct. 186. In *Wiswall* v. *Sampson,* 55 U. S. (14 How.) 52, 14 L. Ed. 322, held that a sale of property on execution, while it was in receivership, made without leave of the court having the property in custody, was "illegal and void, and passed no title to the purchaser."

Under these decisions, no title passed to the defendants here by virtue of the tax deed under which they claim, but which they admit to be void, and therefore the Tuscarora-Nevada Mines Company remained "seized" of the property within the meaning of that word in said Section 8508, as so construed by the Supreme Court of Nevada. It follows that the petitioner, as receiver for that company, may maintain this action.

Section 8512 of the Nevada Compiled Laws, 1929, provides that in every action for the recovery of real property the person establishing legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law, and that the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that the property has been protected by a substantial inclosure, or has been cultivated or improved in accordance with the usual and ordinary methods of husbandry. This is in addition to the payment of taxes by the occupant, as required by Section 8517 of the Nevada Compiled Laws, 1929 (Appendix, post, p. 21). The requirements of these two sections are cumulative, and they must be read together. Indeed, they were formerly combined in one section. See: Section 3709 of Cutting's Compiled Laws of Nevada, 1900; *Reno Brewing Co.* v. *Packard,* 31 Nev. 433, at 440-441, 103 Pac. 415, 104 Pac. 801. There is no proof here, nor even a suggestion, that the property involved has

been so inclosed, cultivated or improved, or that it can be adapted to the uses of husbandry. Petitioner has clearly established legal title to the premises, under the authorities heretofore mentioned.

In *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290, 58 S. Ct. 860, this Court held that Section 34 of the Federal Judiciary Act controls the courts of the United States in suits in equity as well as in actions at law; and in *Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208, 84 L. Ed. 196, 60 S. Ct. 201, this Court held that it was applicable to a suit in equity to remove a cloud on title created by an equitable interest.

The Nevada statutes mentioned, and the construction of one of them by the Supreme Court of Nevada, established a rule of decision binding on the lower courts in this case, quite independent of the pronouncements of this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487; *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, 85 L. Ed. Adv. Ops. 176, 61 S. Ct. 176; *West* v. *American Telephone & Telegraph Co.,* 311 U. S. 223, 85 L. Ed. Adv. Ops. 146, 61 St. Ct. 179; *Six Companies of California* v. *Joint Highway Dist. No. 13 of State of California*, 311 U. S. 180, 85 L. Ed. Adv. Ops. 159, 61 S. Ct. 186.

6.

Under the decisions of this Court the petitioner is not barred from maintaining this action by the doctrine of laches. To justify the application of that doctrine there must be something more than mere lapse of time; delay in bringing action must be accompanied by some factor, such as loss of evidence, change of title, intervention of innocent equities, or large increase in the value of the property involved, which would make it inequitable to grant plaintiff the relief sought because prejudice to the defend-

ant would result. *Galliher* v. *Cadwell,* 145 U. S. 368, 36 L. Ed. 738; 12 S. Ct. 873; *Halstead* v. *Grinnan,* 152 U. S. 412, 38 L. Ed. 495, 14 S. Ct. 641; *Townsend* v. *Vanderwerker,* 160 U. S. 171, 40 L. Ed. 383, 16 S. Ct. 258; *Penn Mutual Life Ins. Co.* v. *Austin,* 168 U. S. 685, 42 L. Ed. 626, 18 S. Ct. 223; *O'Brien* v. *Wheelock,* 184 U. S. 450, 46 L. Ed. 636, 22 S. Ct. 354; *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482, 57 L. Ed. 931, 33 S. Ct. 554.

The local law in Nevada is to the same effect. *Cooney* v. *Pedroli,* 49 Nev. 55, 235 Pac. 637.

In *Pond Creek Coal Co.* v. *Hatfield* (C. C. A., 6th), 152 C. C. A. 456, 239 Fed. 622, it was held that the plaintiff was not chargeable with laches when he did not know of the claims of the defendant until shortly before he commenced his suit, although they were based on a deed executed and recorded more than 21 years previously.

In the instant action, the District Court found that petitioner had no notice of the tax sale and deed until shortly before this action was commenced (R. 170). Until *Ex Parte Tyler,* 149 U. S. 164, 37 L. Ed. 689, 13 S. Ct. 785, ceases to be the law he has the right to assume that no tax sale of the property here involved can lawfully be held without the consent or approval of the court holding it in custody; and that if application for such consent or approval is made, in the course of practice in suits in equity notice will have to be given to him as the receiver for the Tuscarora-Nevada Mines Company.

The defendants here have suffered no prejudice. There has been no claim of loss of evidence. There has been no change of title, except the conveyance to the defendant Thatcher, and he admits that he is not an innocent purchaser of the interest conveyed to him (R. 80-81, 172). No innocent equities of any kind have intervened since the tax sale was held and the tax deed was executed and delivered. The property has not increased in value, but on the contrary, its assessed valuation is now less than one-

third of what it was at the time the defendant Roseberry first went into possession of it; and the improvements of a permanent character which the defendants have made thereon are of inconsequential value.

WHEREFORE, it is respectfully submitted that this petition should be granted.

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Appendix

Section 8505 of the Nevada Compiled Laws, 1929, mentioned in the concurring opinion in the Circuit Court of Appeals, reads as follows:

> "No action can be brought for or in respect to real property by any person claiming under letters patent, or grants from this state, unless the same might have been commenced by the state as herein specified in case such patent had not been issued or grant made."

Section 8513 of the Nevada Compiled Laws, 1929, also mentioned in the concurring opinion in the Circuit Court of Appeals, reads as follows:

> "Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises, under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree, or judgment, or of some part of such premises, under such claim, for five years, the premises so included shall be deemed to have been held adversely, except that where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract."

Section 8514 of the Nevada Compiled Laws, 1929, also mentioned in the concurring opinion in the Circuit Court of Appeals, reads as follows:

> "For the purpose of constituting adverse possession by any person claiming a title, founded upon a written instrument, or judgment, or decree, land shall be deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved.

2. Where it has been protected by a substantial inclosure.

3. Where, though not inclosed, it has been used for the supply of fuel, or of fencing timber, for the purpose of husbandry; or, for the use of pasturage, or for ordinary uses of the occupant.

4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated."

Section 8517 of the Nevada Compiled Laws, 1929, also mentioned in the concurring opinion in the Circuit Court of Appeals, reads as follows:

"In no case shall adverse possession be considered established unless it be shown, in addition to the above requirements, that the land has been occupied and claimed for the period of five years, continuously, and that the party or persons, their predecessors and grantors, have paid all taxes, state, county and municipal, which may have been levied and assessed against said land for the period above mentioned."

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CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 353

HENRY S. HASKINS, as Receiver for the TUSCARORA-NEVADA MINES COMPANY (a corporation),
Petitioner,

vs.

ROY F. ROSEBERRY, et al.,
Respondents.

BRIEF IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI.

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Respondents.

BRIEF IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI.

STATEMENT.

In April, 1913 the District Court for the Southern District of New York appointed Petitioner, a citizen of New York, receiver of the Tuscarora-Nevada Mines Company, a Maine corporation (R. 156) and directed that the business of the corporation be wound up and its property and franchises be converted into money (R. 144, paragraph Seventh).

In August, 1913 the United States District Court for the District of Nevada appointed the petitioner as ancillary receiver of said company, the assets and property of which were situate in the State of Nevada (Finding of Fact IV, R. 157).

In April, 1913 the New York Court authorized the receiver to issue receiver's certificates in the amount of $75,000.00, and these certificates are outstanding and unpaid (Finding of Fact VIII, R. 160).

On July 6, 1941 the Nevada Court dismissed the Nevada proceedings (Finding of Fact V, R. 158). Two years and eight months later, Farrington, District Judge, upon the grounds of his disqualification only, vacated the order of dismissal (Finding of Fact VI, R. 158, 159), and on May 22, 1917 Judge Trippet, sitting for Judge Farrington in the Nevada Court, entered a further order vacating the order of dismissal on the ground that the same had been inadvertently made (Finding of Fact VII, R. 159, 160).

On January 28, 1927 the New York proceeding was dismissed without prejudice to a new suit. No new suit was commenced (Finding of Fact X, R. 160, 161).

On November 29, 1927 the New York Court entered an order requiring the receiver to file a final accounting within thirty days, and ordered that his bond be relieved from further liability (Exhibit No. 6, R. 146).

On February 28, 1928 the receiver filed a petition praying for his discharge and that his bond be released from liability, and on March 6, 1928 filed his account in the form of an affidavit and praying to be

relieved of further duties, and that he be relieved of liability upon his bond (Exhibit No. 6, Exhibit B, R. 146-149).

On March 6, 1928 the New York Court entered an order releasing the sureties on the bond (Finding of Fact XI, R. 161).

In the Nevada Court an order was made on January 14, 1918 directing the sale of the property. No offers were made for the property and the receiver reported no sale (Finding of Fact XII, R. 162).

Subsequent to the accounting of the receiver in 1917 and until about the year 1929, the receiver made efforts to obtain financial assistance with the view of reorganizing and/or rehabilitating the property of said receivership, and/or to obtain offers from prospective purchasers for the sale of the same. Due to the run down and deteriorated condition of the property, no offers could be obtained for the property and the receiver was unable to obtain financial assistance to enable him to operate the property on behalf of the receivership or to pay taxes or counsel fees or receiver's fees, and this condition prevailing and by reason thereof the receiver obtained the orders from the New York Court and the Nevada Court exonerating his sureties on his bond and permitting him to resign (Finding of Fact XIII, R. 162, 163).

In February of 1929 and April of 1930 the receiver reported to the Courts that since the report of June 19, 1917 he had no assets or income or property or rights of any nature except the mining claims referred

to in his report to the New York and Nevada Courts and "had no means of paying the annual assessment work or paying the taxes or looking after the protection of said mining claims" (Exhibit No. 2, R. 59, 60).

Subsequent to April 3, 1929 there were no proceeding of any kind or character in the receivership actions in either the New York or Nevada Courts until the filing by the receiver of his petition in the New York Court praying for leave to file a new bond as receiver and the filing by the receiver of his petition in the Nevada Court on December 21, 1936 praying for reinstatement as ancillary receiver of the Tuscarora-Nevada Mines Company. Said petitions were in each instance filed by Henry S. Haskins without notice to the parties to the action in either the New York or Nevada Courts and without any authority from the parties to the action.

On October 9, 1936 the New York Court authorized the filing of a new bond by Haskins as receiver of Tuscarora-Nevada Mines Company, and on December 21, 1936 the Nevada Court made an order reinstating Haskins as ancillary receiver of said company and restoring him to all the rights and powers given to him under the original order upon filing of a bond. The requisite bonds were filed in both instances (Finding of Fact XIV, R. 163, 164).

From the time of the acceptance of the resignation of the ancillary receiver by the Nevada Court until the institution of this suit, a period of more than eight years has elapsed, and from the time of the dismissal

of the suit in the New York Court more than ten years have elapsed (Finding of Fact XV, R. 164).

During this period of from eight to ten years, no action was taken in either case by the receiver or any party thereto, and there was no act or thing done by Haskins in connection with the property in controversy, and from the time of the acceptance of the resignation of the ancillary receiver by the Nevada Court said Haskins, as receiver or otherwise, never exercised any dominion over any property of Tuscarora-Nevada Mines Company owned or claimed by it in the State of Nevada, and never entered into possession or held possession of any such property (Finding of Fact XVI, R. 164, 165).

During the period between and including the years 1917 and 1922, state and county taxes of the State of Nevada and the County of Elko were levied and assessed against the Tuscarora-Nevada Mines Company upon the property in controversy. That the assessment of said property was duly equalized, as required by law, during said years and taxes thereon were levied in accordance with the laws of the State of Nevada. That for the year 1917 the first installment of taxes was paid but subsequent installments became delinquent and the property was duly sold, in accordance with law, to Elko County, Nevada on July 15, 1918, and thereafter redeemed on September 6, 1918. That the second installment of the taxes for the year 1919 levied against said property was not paid and said property hereinbefore described was sold to Security Development Company on July 19, 1920 for the amount

of said second installment of the taxes levied in that year, but was redeemed on July 18, 1921. That the taxes duly assessed and levied upon said property in controversy were not paid for the year 1921 and the property was on July 17, 1922 sold to W. F. Roseberry and Sons for the amount of the taxes and the penalties thereon in the sum of $181.23. That said property was not redeemed from said tax sale of July 17, 1922, and on July 19, 1923 a deed therefor was made, and delivered by the County of Elko, State of Nevada, through its proper officials, to W. F. Roseberry and Sons (Finding of Fact XVIII, R. 165, 166).

That said deed to W. F. Roseberry and Sons was regular in form and in accordance with the statutes of the State of Nevada, and all tax proceedings, from the assessment by the assessor up to and including the execution of said deed, were regular and in accordance with the statutes and laws of Nevada (Finding of Fact XVIII, R. 165-167).

On April 22, 1930 W. F. Roseberry executed an instrument purporting to be a deed and likewise purporting to convey to Roy F. Roseberry all of said receivership property. That ever since said date Roy F. Roseberry has remained in and upon said property, claiming to have legal possession thereof and claiming to have all the right, title and estate thereto and therein by virtue of said deeds (Complaint, paragraphs VIII and IX, R. 7, 8).

That since the execution of said tax deed the respondents and their predecessors have been in the

actual occupancy of all the property, mines and mining claims the subject of this suit, and they and their predecessors have for each year since 1923 paid all taxes levied and assessed against said property, amounting to approximately $856.00. That as respects the mining claims, the respondents and their predecessors since July 19, 1923 have been in the actual occupancy of said mines and mining claims, and the whole thereof, working the same in the usual and customary mode of holding and working similar claims in the vicinity thereof, and ever since the said date have been in the actual occupancy of the property in controversy, being Lot 11 in Block 1 at Tuscarora, the office buildings and sampling sheds, the Tuscarora water works consisting of pipelines, ditches, etc. and water rights, and have operated the water works, maintained the pipelines, replaced the flume at the head of the pipeline, and through such water works have sold water to customers in the town of Tuscarora, Nevada, collected revenue from the sale thereof in the sum of approximately $3953.00.

That during all of said period respondents and their predecessors have occupied, held and owned said property openly, notoriously and adversely to the petitioner and all the world (Finding of Fact XIX, R. 167-169).

Respondents and their predecessors in the maintenance and operation of said water works and the protection of the water rights and the replacement of the flume at the head of the pipelines and in the operation thereof, as well as in the operation, development, pro-

tection and preservation of said mines and mining claims, have expended in excess of $57,000.00 (Finding of Fact XX, R. 169).

The receiver, in filing his petition in the New York and Nevada Courts for reinstatement and in the commencement of this action, was actuated by recent increases in the price of gold and silver which he believed would make possible a profitable operation of said properties which was not apparent or recognized by him at the time of the filing of his accounts or thereafter and until about the time when said petitions were filed in the New York and Nevada Courts (Finding of Fact XXI, R. 169).

The records of the Nevada Court do not disclose any order or direction of said Court authorizing the tax sale on June 17, 1922 at which the properties in controversy were sold for taxes to W. F. Roseberry and Sons, or authorizing the execution of a tax deed pursuant to said tax sale, and a similar situation exists as respects the New York Court (Finding of Fact XXII, R. 169, 170).

The petitioner had no actual notice of the tax sale or of the execution and delivery of the tax deed made pursuant thereto prior thereto or prior to the execution of said tax deed, except such constructive notice as may be imputed to him, until shortly before the commencement of this action (Finding of Fact XXIII, R. 170).

During the time Haskins was receiver and during the years 1917, 1918, 1919 and 1920 taxes were levied

and assessed against the property in controversy and paid by the receiver, and he also redeemed the property from sales on account of delinquent taxes for the years 1917 and 1919 (Finding of Fact XVIII, R. 165-167).

No order was made or entered by either the New York Court or the Nevada Court directing the returning or other disposition of the property which came into the hands of the receiver (Finding of Fact XXIV, R. 170, 171).

The property in controversy was in the custody and control of the receiver at the time of the tax sale to Roseberry and Sons (Finding of Fact XXV, R. 171).

At the time Geo. B. Thatcher acquired the one-half interest in the property he had actual notice of the controversy presented, and makes no claim of being an innocent purchaser (Finding of Fact XXVII, R. 172).

ARGUMENT.

THE ACTIONS IN THE NEW YORK AND NEVADA COURTS HAD BEEN DISMISSED AND THE RECEIVERSHIP TERMINATED LONG PRIOR TO THE COMMENCEMENT OF THE ACTION.

The ancillary suit in the Nevada Court was dismissed July 6, 1914, and the order of Judge Farrington of March 17, 1917 and the subsequent order of Judge Trippet of May 22, 1917 vacating the order of dismissal were void because the court had no power to vacate the judgment of dismissal and reinstate it

because the term, and indeed a number of terms, had expired when the Farrington and Trippet orders were made. See

Dillon v. U. S., 29 Fed. (2d) 246 (C.C.A. 9);
Nealon v. Davis, 18 Fed. (2d) 175.

The Farrington order of dismissal was not void because of his disqualification or because of the existence of disqualifying grounds. See

Utz & Dunn Co. v. Regulator Co., 213 Fed. 315 (C.C.A. 8).

The New York proceeding was dismissed on January 28, 1927 without prejudice to a new suit, and no new suit was ever commenced. The rule is well settled that where the primary case is dismissed the ancillary case falls with it. See

Lion Bonding & So. Co. v. Karatz, 262 U. S. 77, 67 L. Ed. 871;
Primos Chemical Co. v. Fulton Steel Corporation, 254 Fed. 454;
Equitable Trust Co. v. Washington-W., L. & P. Co., 300 Fed. 601;
Emerick v. Oswego Falls Pulp & Paper Co., 271 Fed. 359.

THE DISMISSALS TERMINATED THE RECEIVERSHIP AND RESTORED THE PROPERTY TO TUSCARORA-NEVADA MINES COMPANY WITHOUT THE NECESSITY OF FORMAL ORDER.

When a bill upon which the appointment is made is afterward dismissed, the duties of the receiver cease as between the parties to the action. So when defend-

ant in the action in which a receiver was appointed obtains final judgment therein, the entry of judgment would have the effect of terminating the receiver's functions. See

High on Receivers (Third Edition), Sec. 833;
Alderson on Receivers, Sec. 655, at pages 890, 891.

When the powers and duties of a receiver are at an end the property in his possession belongs to the party in whose favor judgment was rendered, who is entitled to it without further delay or order of the court. See

Alderson on Receivers, Sec. 657;
State ex rel. Oudin v. Superior Court of Spokane County, 71 Pac. 1095;
Rumney v. Donovan, 72 Pac. 305.

THE RECEIVER ABANDONED THE PROPERTY.

The record discloses not only an actual abandonment but an intent to abandon the property in controversy as an asset of the receivership. The receiver reported that he had no money to pay taxes, do assessment work, or protect or preserve the property. This was as early as April 3, 1923, and like representations were made to the Courts in 1928 and 1929. For more than ten years the receiver failed to exercise any dominion over the property and stood by without asserting his claim from 1923 until the commencement of this suit.

That a receiver can abandon assets we think is settled law, and applies equally to receivers and to trustees in bankruptcy. See

Dushane v. Beall, 161 U. S. 513, 40 L. Ed. 791;
U. S. F. & G. v. Mound Lake etc. Co., 195 So. 495;
Mesirov v. Innis Speiden & Co., 97 Atl. 160;
Remington on Bankruptcy, Vol. 2, Sec. 1158.

The rule is also settled that upon such abandonment the title revests in the owner.

Remington on Bankruptcy, Vol. 2, Sec. 1159.

AS RESPECTS SECTION 6449, NEVADA COMPILED LAWS, 1929.
(See Appendix.)

This section of the Nevada law is part of the statutory law of Nevada dealing with revenue and taxation. Similar statutes have been held to be statutes of peremption, as distinguished from statutes of prescription, and not only bar the remedy but destroy the cause of action itself, and a void deed may constitute a basis for the running of the statute of limitations. See

Jorgensen v. Thurston County, 259 Pac. 720;
Perry v. Marbury Lumber Co., 103 So. 580 (Ala.);
Dodson v. Middleton, 135 Pac. 368 (Okla.);
Jones v. Logan, 108 Pac. 81 (Kans.);
O'Keefe v. Behrens, 85 Pac. 555 (Kans.);
Hollingsworth v. Schanland, 99 So. 613.

It has also been held that a tax deed to property in the hands of a trustee in bankruptcy was none the less sufficient to start the statute of limitations running against the trustee. See the opinion of Judge Van Devanter in

In re Eppstein, 156 Fed. 42.

AS RESPECTS SECTION 8512, NEVADA COMPILED LAWS, 1929

which provides:

> "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it shall appear:
>
> 1. That it has been protected by a substantial inclosure; or,
>
> 2. That it has been cultivated or improved in accordance with the usual and ordinary methods of husbandry."

This section does not have the effect, nor should it be construed, as urged by petitioner. It merely creates a presumption of legal title, and that the occupation by any person other than the legal holder of the title is subordinate unless it appears that the property was protected by an enclosure or is cultivated or improved by ordinary methods of husbandry. This presumption must give way to the evidence and facts, which here

conclusively show that neither the Tuscarora-Nevada Mines Company nor the receiver have been in possession of the property or exercised any dominion over it for more than eight years prior to the commencement of the action. See

New York Insurance Co. v. Gamer, 303 U. S. 161, 82 L. Ed. 726.

A similar contention was made in the case of

O'Banion v. Simpson, 44 Nev. 188, 191 Pac. 1083,

where the court said:

> "The cultivation, improvement, inclosure, and the pasturage of land not inclosed is, by the distinct affirmation of the statute, evidence of adverse possession, but the statute does not exclude evidence of possession manifested in some other appropriate manner."

Moreover, the applicable statute (Section 8508, Nevada Compiled Laws, 1929) dealing with adverse possession of mining claims contains this provision:

> "* * * All the provisions of this act, which apply to other real estate, so far as applicable, shall be deemed to include and apply to mining claims; * * *."

The boundaries of mining claims are defined by monuments, but no one ever heard of them being protected by substantial enclosures, and it would be indeed strange if they were cultivated or improved in accordance with the usual and ordinary methods of husbandry.

As respects the water line, pipeline and water works, it appears that they were put to the use and placed to the use to which they were adopted. This is sufficient to establish adverse possession. See

Kellogg v. Huffman, 30 Pac. (2d) 593;

Dargan v. Keystone Mills Co., 86 S. W. (2d) 726.

See also

O'Banion v. Simpson, supra.

AS RESPECTS THE CONTENTION THAT THERE WAS NO DISSEIZIN, AND THAT THE TAX DEED WOULD NOT SUPPORT A CLAIM OF ADVERSE POSSESSION.

It is urged that adverse possession cannot be gained where the deed relied upon as color of title is wholly void and not merely voidable. The authorities upon which petitioner relies are cases where the tax deed was void on its face. Here the tax deed, according to the Findings of Fact and stipulation of the parties, was regular in form and in accordance with the statutes of Nevada, and all proceedings, from the assessment by the assessor up to and including the execution of the deed, were regular and in accordance with the statutes and laws of the State of Nevada (R. 166, 167; R. 40, 41).

The order appointing the receiver was something extraneous the tax law, the tax proceedings and the deed. The tax deed, under the authorities, constitutes a good and sufficient color of title on which to base a

claim of adverse possession, even though it be defective and, as said in some cases, even though it be worthless. See

Black on Tax Titles, p. 375;
Pillow v. Roberts, 13 Howard 472, 14 L. Ed. 228.

Moreover, as appears from the Complaint (paragraphs VIII and IX, R. 7, 8), W. F. Roseberry on the 22nd of April, 1930 executed a deed to the land and property here in controversy to Roy F. Roseberry, and the Complaint alleges that Roy F. Roseberry thenceforward wilfully and without warrant of law has remained in and upon the property and claimed to have legal possession thereof, and likewise makes a claim to all of the right, title and estate thereto and therein under and by virtue of said alleged deeds as hereinbefore set forth.

In

O'Banion v. Simpson

the Supreme Court of Nevada said:

> "The argument that the respondents' occupancy and possession of the property is not shown to be hostile to appellant's title is clearly against the weight of the evidence. Entry by a grantee holding under a deed of conveyance for the entire estate, or a specific portion thereof, by metes and bounds, containing covenants of seizin and warranty, made by one of the cotenants and duly placed on record, has all the constituent elements of a disseizin at common law. Co. Litt. b. n. 1.
>
> Such a conveyance as that here in question determines the quo animo with which entry is made under it, and gives character to the possession after entry made. Foulke v. Bond, supra. The

> entry of such grantee cannot be presumed to be that of a cotenant, nor in subordination to the rights of the cotenancy. Every act of ownership on the part of such grantee after entry must necessarily be adverse to any other part owner. His possession under such circumstances is adverse from its inception. Abernathie v. Con. V. M. Co., 16 Nev. 270; Freeman on Cotenancy, sec. 224.
>
> It will not be denied that one of the most effective means of proving ouster is by showing the exercise of dominion over the land by the adverse claimant. 1 R. C. L. sec. 15, p. 703."

We further urge in this respect that the receiver cannot be said at any time to have been seized of the property in controversy, a receiver being merely a custodian for the court and for the benefit of the party ultimately proved to be entitled. See

53 *C. J.* 96, 97, Sec. 119;
53 *C. J.* 93, 94, Sec. 117.

Moreover, with the dismissals of the New York proceedings, the consequent falling of the ancillary proceedings in the Nevada Court and the dismissal in the Nevada Court, and by reason also of the abandonment of the asset, Tuscarora-Nevada Mines Company, and not the receiver, was the only one who could have been seized of the property in controversy.

As to the mining claims and Section 8508 of Nevada Compiled Laws, 1929, we call attention to the construction placed upon that statute by the Circuit Court of Appeals for the Ninth Circuit in

Ralph v. Cole, 249 Fed. 81

(reversed on other grounds), citing with approval the

case of *420 Mining Co. v. Bullion Mining Co.*, 9 Nev. 241:

> "The fact, as found by the court, that the defendant has been in the actual, exclusive, and uninterrupted occupation and possession of all the mining ground in dispute, claiming title thereto adversely to plaintiff, for more than seven years prior to the commencement of this suit constitutes a complete bar to this action."

AS RESPECTS THE SUFFICIENCY OF THE PLEADING OF THE DEFENSES OF THE STATUTES OF LIMITATIONS AND LACHES.

We urge that the statutes of limitations and laches are affirmatively and fully pleaded by a pleading of the facts (R. 23, paragraph I; R. 24, 25, paragraph I; R. 26, paragraph III).

37 *C. J.* 1219, Sec. 726;

37 *C. J.* 1221, Sec. 728.

In

Huntington v. Huntington, 152 Fed. 240,

the court said:

> " 'Anything in an answer which will apprise the plaintiff that the defendant relies on the statute of limitations is sufficient, if such facts are stated as are necessary to show that the statute is applicable.' "

AS RESPECTS THE APPLICATION OF THE DOCTRINE OF LACHES.

The record shows that the receiver reported that he was unable to protect and preserve the property and

had no funds to pay taxes or to do annual assessment work upon the claims. Under these circumstances and upon his prayer, he was permitted to resign and his sureties were released from liability.

The receiver abandoned the property, and the respondents expended $57,000.00 in caring for and developing the property. While this was being done, neither the receiver nor any creditor or holder of receiver's certificates took any action in connection with the property or asserted or claimed any right, title or possession thereto until the recent increase in the price of gold which gave the claims a value which they did not possess when the receiver abandoned them.

The petition asserts that the respondents have suffered no prejudice. We assert that holding, working, developing and preserving the property in controversy at an expense of $57,000.00 constitute prejudice.

It is also asserted in the petition that "the property has not increased in value, but on the contrary its *assessed valuation* is now less than one-third of what it was at the time defendant Roseberry first went into possession". This is an erroneous statement.

There is very considerable evidence of value other than the assessed value, and ample evidence of enhancement. The Complaint alleges (paragraph XIII, R. 9, 10) that on April 3, 1929 (the date of the resignation of the receiver and exoneration of his bond) the properties in controversy had no ascertainable value which might then be rendered beneficial to the holders of the receiver's certificates. The Complaint thereafter alleges (paragraph XIV, R. 10) that because of

the current increase in the market value of monetary metals which are contained in ores obtainable from said properties, certain persons have recently recognized the possibilities of profitable operation of said mining properties. The Complaint further alleges (paragraph XV, R. 12) that petitioner's investigations have disclosed that the properties have certain values not apparent or discernible at the time of his accounting on June 19, 1917, nor for a long time thereafter, but which have become discernible and which, if converted into liquid assets, will accomplish, in part at least, the discharge and payment of the said outstanding receivership certificates (amounting to in excess of $75,000.00).

The petition for reinstatement made to the Nevada Court alleges that because of the recent increase in the price of gold and silver * * * the possibilities of profitable operations of said mining properties have been foreseen (R. 67), and also alleges that the properties "have certain values which were not apparent or recognized at the time of filing his accounting with the Court on June 19, 1917, but which have since been discovered, and which, if converted into cash, will do much to pay off and discharge the outstanding receiver's certificates" (R. 68).

In the petition for reinstatement addressed to the New York Court, Haskins represented that "all of said properties your petitioner believes are of considerable value", and in this same petition (R. 119) also declares that "because of the recent increase in the price of gold which is reported to exist in the properties referred to, higher returns may be expected,

increasing the possibilities of profitable operation or sale of the properties", and on page 120 of the Record he refers to the property as a valuable asset of the receivership. See also R. 136. See also the amendment to petitioner's Complaint, where it is alleged that the value of the matter in controversy, exclusive of interest and costs * * * exceeds $3000.00 (R. 183, 184), and a similar allegation in respondents' counterclaim that the amount and value in controversy *greatly* exceeds the sum of $3000.00 (paragraph II, R. 25, 26) and this allegation is admitted by the Reply (R. 30).

These facts bring the instant case squarely within the leading case of

Chase v. Chase, 37 Atl. 804.

Moreover, enhancement in value is not an essential condition as respects mining claims, where the doctrine of laches is relentlessly enforced. See

Noble Gold Mines Co. v. Olsen, 57 Nev. 448 at 463, 465, 63 Pac. (2d) 1005.

WHEREFORE, respondents pray that the Petition for a Writ of Certiorari be denied.

Dated, Reno, Nevada,
September 5, 1941.

Respectfully submitted,
GEORGE B. THATCHER,
WILLIAM WOODBURN,
Attorneys for Respondents.

(Appendix Follows.)

Appendix

SECTION 6449, NEVADA COMPILED LAWS, 1929.

"§ 6449. DEEDS FOR PROPERTY SOLD FOR DELINQUENT TAXES.—WHAT SUCH DEEDS ARE EVIDENCE OF.—DEED CONVEYS ABSOLUTE TITLE. § 41. If the property is not redeemed within the time allowed by law for its redemption, the treasurer, or his successor in office, must make to the purchaser, or his assignee, a deed of the property, reciting in the deed substantially the matters contained in the certificate of sale, and that no person has redeemed the property during the time allowed for its redemption. The treasurer shall be allowed a fee of three dollars for making such deed, which, together with the cost of acknowledging the same, shall be paid by the purchaser; provided, that when the deed is made to the county as the purchaser the treasurer shall make the deed and the county clerk shall take the acknowledgment without charge; provided further, that such deeds hereafter issued shall be recorded in the office of the county recorder within thirty days from the date of expiration of the period of redemption. If not so recorded, such deeds, and all proceedings relating thereto from and including the assessment, shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate or any portion thereof, where the latter conveyance shall be first duly recorded. All such deeds, whether heretofore or hereafter issued, are primary evidence that the property was assessed as required by law; that the property

was equalized as required by law; that the taxes were levied in accordance with law; that the taxes were not paid; that at a proper time and place the property was sold as prescribed by law, and by the proper officer; that the property was not redeemed; that the person who executed the deed was the proper officer; that where the real estate was sold to pay taxes on personal property, the real estate belonged to the person liable to pay the tax; and are (except as against actual fraud) conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed. Such deed conveys to the purchaser the absolute title to the property described therein, free of all incumbrances, except when the land is owned by the United States, or this state, in which case it is prima-facie evidence of the right of possession, accrued as of the date of the deed to the purchaser. No tax heretofore or hereafter assessed upon any property, or sale therefor, shall be held invalid by any court of this state on account of any irregularity in any assessment, or on account of any assessment or tax roll not having been made or proceeding had within the time required by law, or on account of any other irregularity, informality, omission, mistake or want of any matter of form or substance in any proceedings which the legislature might have dispensed with in the first place if it had seen fit so to do, and that does not affect the substantial property rights of persons whose property is taxed; and all such proceedings in assessing and levying taxes, and in the sale and conveyance therefor, shall be pre-

sumed by all the courts of this state to be legal until the contrary is affirmatively shown. No action or counterclaim for the recovery of lands sold for taxes shall lie unless the same be brought or interposed within three years after the execution and delivery of the deed therefore by the treasurer, any law to the contrary notwithstanding."